IN THE DISTRICT COURT
AT GISBORNE

I TE KŌTI-Ā-ROHE
KI TŪRANGANUI-A-KIWA

CRI-2021-016-001211
[2023] NZDC 19069

GISBORNE DISTRICT COUNCIL
Prosecutor

v

YANNIS KOKKOSIS
GYPSY INVESTMENTS LIMITED
Defendants

Hearing:	30 August 2023
Appearances:	A Hopkinson for the Prosecutor A Simperingham for the Defendants
Judgment:	30 August 2023

NOTES OF JUDGE B P DWYER ON SENTENCING

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[1] Gypsy Investments Ltd (GIL) and Yannis Kokkosis (jointly - the Defendants) each appear for sentence on one charge of breach of the Resource Management Act 1991 brought by Gisborne District Council (the Council).

[2] The charges are contained in charging documents ending 0645 for GIL and 0647 for Mr Kokkosis:

- That Gypsy Investments Ltd, between 1 September 2020 and 6 February 2021, at or near 42 MacDonald Street, Te Hapara, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in

that it used land in a manner that contravened Regulation 11 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0645); and

- That Yannis Kokkosis, between 1 September 2020 and 6 February 2021, at or near 42 MacDonald Street, Gisborne, contravened or permitted a contravention of s 9(1) of the Resource Management Act 1991 in that he used land in a manner that contravened Regulation 11 of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 by disturbing soil when that activity was not expressly allowed by a resource consent, and was not an activity allowed by ss 10, 10A or 20A of the Resource Management Act 1991 (charging document ending 0647).

[3] The Defendants are "related" with Mr Kokkosis being the sole director and (I understand) shareholder of GIL at the time of the offending. I will treat the actions of Mr Kokkosis as being also the actions of GIL.

[4] The Defendants were found guilty of the charges after a defended hearing in March this year (the Decision).[1] One other charge against each Defendant was dismissed. Mr Kokkosis has applied for a discharge without conviction on the charge against him personally but not for GIL. The Council opposes the application and seeks conviction and the imposition of a fine against both Defendants.

[5] The offending for which the Defendants are to be sentenced occurred on 31 October 2020. At that time GIL owned a Residential Zone property at 42 MacDonald Street, Gisborne (the Site) containing 2,605 square metres of land. The Defendants intended to subdivide the Site into four lots, one of which would contain an existing dwelling house with three vacant lots for building on.

[1] *Gisborne District Council v Kokkosis* [2023] NZDC 4734.

[6] In August/September 2020 Mr Kokkosis contacted Land Development and Engineering Ltd (LDE - a company with expertise in land development) seeking its assistance in the subdivision proposal. On 2 September 2020 an employee of LDE sent Mr Kokkosis an email setting out a proposal for LDE to undertake a geotechnical and soil contamination report to support a subdivision application to the Council. The email described the scope of work to be undertaken by LDE and contained the following statement:

> **Proposed work scope environmental.**
>
> A short desktop review indicates that historically land uses at the site include possible horticultural activity as well as buildings that have since been removed. These activities pose a possible lead/arsenic and asbestos contamination which is required to be assessed including soil sampling.

[7] As was noted in the Decision:

> In short, on 2 September 2020 the Defendants were alerted that there was a potential contamination issue pertaining to the site.

Mr Kokkosis responded to the email by confirming that LDE was to undertake a geotechnical and contamination assessment of the site.

[8] The sampling, testing and investigative steps which followed are set out in full in paragraphs [11] to [12] of the Decision which should be read in conjunction with this sentencing decision.

[9] In summary, the sampling and testing done by LDE established that an area of the Site referred to as the "piece of land" was contaminated with asbestos and very high levels of arsenic and lead. It was not disputed at hearing that the levels of arsenic and lead brought the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NES or the Regulations) into play.

[10] On 8 and 12 November 2020 LDE emailed Mr Kokkosis regarding steps required to be taken regarding the contaminated soil. On 13 November LDE sent Mr Kokkosis a completed site investigation report which, among other things, advised

that a remedial action plan for the Site was required before any earthworks were done there.

[11] On 15 November 2020 Mr Kokkosis responded advising that the contaminated soil had already been removed to a land fill. This had been done on 31 October. This advice ultimately led to termination of the relationship between the Defendants and LDE who sent a copy of the Site investigation report to the Council. The ultimate outcome of that process was this prosecution and the Court's findings that the land disturbance of the Site undertaken by the Defendants on 31 October 2020 to remove the contaminated soil was in breach of the Regulations and hence s 9(1) RMA.

[12] In determining the sentence outcome in this case I am going to have regard to the following matters:

- The Defendants' culpability for the offending;
- The adverse effects of the offending;
- Comparative cases;
- Starting point;
- Previous convictions;
- The application for discharge without conviction.

[13] The Council contends that the offending was moderately serious and that Mr Kokkosis' culpability for it was high. The Council points to the fact that Mr Kokkosis was advised by LDE staff on three occasions prior to removal of the soil that there was a contamination issue at the Site in respect of arsenic and lead.

[14] After hearing from counsel today and reviewing the transcript of the trial, I am satisfied that Mr Kokkosis was verbally advised by Mr J E Davenport of LDE prior to removal of the contaminated soil that he would need to apply for a resource consent

and put a remedial action plan in place. There is accordingly a high level of culpability on his part for the offending.

[15] In so far as assessing effects of the offending is concerned, there are a number of countervailing factors in play. The NES sets out to protect people from risks to their health as a result of exposure to contaminants contained in soil. Arsenic and lead both have the potential for seriously toxic effects on people. These were described in paragraphs 18(b)(i) and (ii) of the Council's submissions in these terms:

> (b) Potential environmental harm – There is no evidence of actual harm from the unlawful disturbance of the contaminated soil from the site. However, it is submitted that the potential adverse effects of the soil disturbance are relevant given that:
>
> (i) The level [of] arsenic and lead contamination found in the soil at the site was extremely high. The maximum level of arsenic detected was 225 mg/kg which is eleven times higher than the residential guideline value under the NES-CS. The maximum level of lead detected was 1,310 mg/kg which is six times higher than the residential guideline value under the NES-CS. The maximum levels of arsenic and lead in the soil samples from the piece of land were 25 and 48 times higher respectively than Hawke's Bay background levels.
>
> (ii) Arsenic and lead can have very serious effects on human health.
>
> (1) Arsenic is of relatively high toxicity with the following long-term endpoints: it is mutagenic, a proven human carcinogen (causing internal cancers such as bladder and liver cancers), and is highly toxic from chronic exposures.
>
> (2) The main health effects associated with lead exposure are neurotoxicity, developmental delays, hypertension, impaired haemoglobin synthesis, and male reproductive impairment.
>
> (footnotes omitted)

[16] There is no proof that such effects happened in this case. That is not uncommon in incidents such as this where any health effects might emerge over years of exposure. There is no dispute that potential for exposure is an effect which must be taken into account even if no actual exposure is proven. It should also be recognised that the levels of arsenic and lead identified at four out of eight sample spots on

initially testing were extremely high, arsenic being 11 times higher than the residential guidance value under the NES and lead six times higher.

[17] However I also recognise that these samples were probably from "hot spots" associated with former buildings on the Site which I do not understand to necessarily be representative of contamination levels across the wider area. In light of the evidence at hearing it appears that potential exposure to any contaminated soil by persons such as the tenants of the Site, would have been brief and over a period which I understood to be about one day when the contaminated soil was dug up, carried in two truck loads through the streets and deposited at the land fill. It seems to me unlikely that tenants or their children would have been undertaking activities in this area while soil removal involving heavy machinery was being undertaken.

[18] Finally in this regard, the Defendants obtained a retrospective resource consent, replaced the removed contaminated soil with uncontaminated top soil and undertook soil testing across the whole Site, not just the piece of land where the four contaminated samples were located. A site assessment by EAM Environmental Consultants establishes that appropriate remediation had been carried out and concluded that the soils of the Site are now highly unlikely to present a risk to human health at all.

[19] Mr Hopkinson for the Council advises that this is the first prosecution brought in breach of the NES so there are no directly comparable cases in that regard. There are, however, a number of landfill/dumping type cases which can raise similar issues and which were cited by counsel.

[20] Perhaps the most apposite in a number of respects is the *Southland Regional Council v Braithwaite* decision referred to by Mr Hopkinson.[2] That case involved connected defendants (similar to this case) discharging soil containing some contaminated material into a clean fill which was not allowed to receive that material. Although the owner of the clean fill and an engineer had agreed to the deposition, the Court found the defendant's responsibility lay in discharging the contaminated material when a resource consent report had identified the presence of contaminated

[2] *Southland Regional Council v Braithwaite* [2017] NZDC 27026.

materials which were also readily visible to council officers when they inspected the discharge. The owner of a nearby landfill had advised that the material should not go to a clean fill.

[21] In this case the Defendants were informed on three occasions by their own advisors that arsenic and lead were present in the soil on site and on one occasion that a resource consent was required to disturb the soil prior to that being done. In light of that direct advice these Defendants might be assessed as having a higher degree of culpability than in *Braithwaite* where there was similarly no evidence of adverse effects and starting points of $10,000 were adopted for each defendant.

[22] The other observation which is frequently made by the Court is that that persons in business can reasonably be expected to know and comply with the rules and regulations under which they must operate.[3] That observation applies equally to these Defendants even though they were first time subdividers.

[23] In reaching a figure for starting point, I have been strongly influenced by the following factors:

- The absence of information as to the extent of arsenic and lead contamination and the likelihood that their presence on the piece of land was confined to identified hot spots in specific and limited areas rather than more widely spread;[4]

- The fact that exposure of people to the contaminated soil would have been limited to the time when excavation and removal was actually being undertaken, at which time outside parties were unlikely to have been undertaking activities there in any event;

- The remediation undertaken by the Defendants as part of the removal process.

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[3] *Porirua City Council v McPhee* [2017] NZDC 27346 at [21], *Taranaki Regional Council v Silver Fern Farms Ltd* [2021] NZDC 3430 at [28].

[4] I think that conclusion is confirmed by the fact that the removed soil was replaced by soil excavated from elsewhere on the Site which was assessed by EAM as highly unlikely to present a risk to health.

[24] Counter-balancing those factors is the fact that the Defendants proceeded with the soil disturbance notwithstanding the direct advice given to them by LDE as to the need for resource consent. That is where the seriousness of the offending lies and, in my view, distinguishes this offending from that in *Braithwaite*. Further to that I refer to the need for deterrence of developers from failing to meet their obligations to comply with the requirements of the NES which seeks to protect human health from the effects of contaminants in soil.

[25] Having regard to all of those considerations I determine that the appropriate penalty starting point in this case is the sum of $30,000 which I will divide $10,000 for Mr Kokkosis and $20,000 for GIL.

[26] I have not allowed for any aggravating or mitigating factors in my penalty considerations. There are no relevant RMA offences which might add to the starting point although I record that Mr Kokkosis has a previous conviction for a blood alcohol offence, which I will refer to in conjunction with the application for discharge without conviction. I do not take that into account in fixing a penalty in this case.

[27] Gypsy Investments Ltd is hereby convicted of the offence contained in charging document ending 0645. I do not see anything in the material before the Court which warrants a reduction from starting point and it is accordingly fined the sum of $20,000. It will pay solicitor costs in accordance with the Costs in Criminal Cases Regulations (fixed by the Registrar if need be) and Court costs of $130. I record that there is no dispute as to GIL's financial capacity to meet a fine of this amount.

[28] Pursuant to s 342 RMA I direct that the fine less 10 per cent Crown deduction is to be paid to Gisborne District Council.

[29] Those findings bring me to the application for discharge without conviction for Mr Kokkosis. The Court has the power to discharge a defendant without conviction

pursuant to s 106 Sentencing Act 2002. That power is constrained by the provisions of s 107 which provide:

> The Court must not discharge an offender without conviction unless the Court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[30] Dealing firstly with the gravity of the offence, I observe that notwithstanding the comparatively low level of starting point I have adopted in comparison with potential maximum penalties, I consider that there is an element of some gravity involved in this offending, namely that the Defendants who were land developers undertook soil disturbance on the Site notwithstanding that they were told by their engineering advisors that a resource consent and land remediation plan were required. That work was done contrary to the requirements of an NES seeking to protect human health from contaminants which were known to be present in the soil in this case.

[31] The direct and indirect consequences of conviction upon which Mr Kokkosis rely are two fold:

- Firstly, a potential consequence on his current employment;

- Secondly, a potential consequence on his ability to obtain work flying helicopters in Canada.

[32] Insofar as the first matter is concerned, Mr Kokkosis deposed that he is employed by a company called Switched On Housing Ltd for whom he oversees building work for Kāinga Ora. The work involves disposal of building waste, sometimes including asbestos. Mr Kokkosis deposed that his employment with Switched On Housing is governed by a *Code of Conduct*, a copy of which he provided. He deposed as follows in paragraphs [19] to [20] of a declaration which he provided:

> 19. If I am convicted of a resource management-related offence, I will arguably be in breach of clause 8 of the Code of Conduct. Clause 8 provides:

> ***8 Harm to business or reputation***
>
> *Employees/contractors must refrain from engaging in conduct that could adversely affect Switched On's business or reputation.*
>
> *Such conduct includes but is not limited to:*
>
> *…*
>
> *Engaging in criminal conduct or other behaviour that could harm Switched On's business or reputation*

20. I understand that breaches of clause 8 can occur even if the incident is not work-related.

[33] These contentions raise the consequence of potential for loss of his current employment in the event that he is convicted in this case. Those contentions are supported by reference to the *Code of Conduct* and considering the information which his employer is required to provide to Kāinga Ora.

[34] On close balance I consider that loss of employment would make the consequences of Mr Kokkosis' offending out of all proportion to the seriousness of the offending. In saying that I recognise that the offending occurred in the context of property development which has some relationship to Mr Kokkosis employment situation.

[35] Mr Kokkosis' action in ignoring the advice given by LDE as to the need for resource consent was reckless and appears to have been undertaken in an ill-advised attempt to get on with development of the Site but as part of that process any potential effects of contamination were fully remediated and the Site made safe. I consider that it would be an unduly harsh consequence if he lost his job as a consequence. However, I am not satisfied by the material that I have seen that this consequence is reasonably likely or not. I am simply unable to find that either way. The only evidence in front of me is the declaration provided by Mr Kokkosis.

[36] I concur with Mr Hopkinson's comments as to the sort of information which ought to be presented in that regard, in particular the need for information from Mr Kokkosis' employer confirming his contentions. I do not consider that contentions advanced by Mr Kokkosis solely provide an adequate probative basis on which I am able to act. I will return to that matter shortly.

[37] Insofar as the contentions regarding Mr Kokkosis seeking helicopter work in Canada are concerned, I will insert in this decision paragraphs [30] to [36] of Mr Kokkosis' deposition and I am not going to read those out in full:

> **My career as a helicopter pilot in Canada**
>
> 30. I have held a helicopter licence for more than 10 years. When I was younger, I worked as a helicopter pilot in a variety of countries throughout the world. In particular, I flew helicopters in the following countries and contexts :
>
> - Tuna boats - throughout the Pacific American trust territories - such as Majuro, Pohmpei; and the Solomon Islands. I was involved in assisting purse seiner vessels to locate and hunt tuna
> - Australia - tourism operations out of Cairns going to the Great Barrier Reef
> - Australia - Horn Island - flying Telstra (telecommunications) technicians
> - Australia, Northern Territories - uranium mine exploration
> - Australia, Northern Territories - flying Telstra (telecommunications) technicians to remote locations
> - Borneo, Malaysia - flying doctors and medical evacuations
> - Super yacht that travelled around Miami, Mexico and the Caribbean - flying VIPs from airports to the yacht
>
> 31. I plan to move to Canada to work as a helicopter pilot, and I am contemplating applying for helicopter pilot jobs in Canada. However, I cannot apply for these Canadian jobs without having a visa first. My dream is to set up the housing at 42 McDonald Street and to pay off the related debt to the point where those properties create a passive income for me. I would then be able to live in places like Canada and continue work as a helicopter pilot doing work like heli skiing and any other interesting aviation work.
>
> 32. In the meantime, I need to keep working for Switched On Housing Ltd to make ends meet to fund the development at 42 McDonald Street, including paying mortgages and other debt.
>
> 33. I still owe about $121,000 in a student loan, in relation to the flying hours and courses I did in relation to getting my commercial helicopter pilot licence. I really need to get into a good commercial piloting job, overseas, to repay my huge student loan.
>
> 34. I looked at applying for a Canadian visa back in 2019, but this was delayed by the covid-19 pandemic, so I have not yet filed my visa application. Marked and annexed **"E"** and **"F"** in this affidavit are

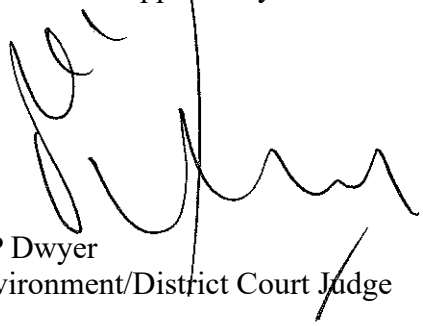
> documents which evidence my previous Canadia [sic] visa applications, namely emails that I received dated 26 August 2019 and 9 September 2019 in relation to enquiries that I made about applying for a work visa in Canada.
>
> 35. I have received advice that a conviction will make it more difficult for me to travel to work in Canada or other countries. This is gutting for me.
>
> 36. I accept that I breached the RMA regulations when I dumped contaminated soil from the McDonald Road site on 31 October 2020, but it would seem unfair if a conviction for this offending means that I cannot go to work in Canada. The debts I face include my student loan $121,000) and legal and repayment amount ($58,730), plus any fine or donation that I am obliged to pay as a consequence of my offenidng. [sic]I will be gutted if I cannot go to Canada to work, to reduce my debt levels and get on with my life.

[38] I have had regard to an affidavit provided to the Court by Mr S Laurent, a legal practitioner highly experienced in immigration law. Mr Laurent explained his understanding of Canadian visa and work permit requirements to the extent that he was able (he was clear to explain the limitations of his knowledge in that regard). I understand that when making any visa or work permit applications to enter Canada, Mr Kokkosis would have to declare any conviction in this case as well as the much older conviction for blood alcohol offending (for which he may or may not be eligible for some sort of remittance due to the expiry of time).

[39] Either of a conviction now or the previous conviction may provide an obstacle to Mr Kokkosis being able to live and work in Canada, but not definitely so. There is apparently an element of discretion on the appropriate Canadian authority's part whose exercise is beyond either Mr Laurent or this Court to predict. When that fact is combined with the somewhat inchoate nature of Mr Kokkosis' intentions regarding work in Canada, I would not grant a s 106 discharge on that basis.

[40] Accordingly I will adjourn completion of Mr Kokkosis' sentencing until 22 September to enable him to provide such further information as he is able by way of affidavit or statutory declaration from his employer as to the consequences of conviction on his employment at which time I will complete his sentencing. I require him to provide the Council with that information by 15 September so that Mr

Hopkinson has some time to consider the information and advise the Court whether he wants the opportunity to be heard further.



B P Dwyer
Environment/District Court Judge